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UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

4 | Adv. Case No. 08-01789-brl

6 | In the Matter of:

7 SECURITIES INVESTOR PROTECTION CORPORATION

8 Plaintiff,

9

v.

10 BERNARD L. MADOFF INVESTMENT SECURITIES, LLC, et al.,

11 Defendants.

13

14 United States Bankruptcy Court

15 One Bowling Green

16 New York, New York

17

18 | November 30, 2011

19 | Page

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21 B E F O R E :

22 HON. BURTON R. LIFLAND

23 U.S. BANKRUPTCY JUDGE

24

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2 (cc-4469) Trustee's Motion for Entry of an Order Establishing
3 Notice Procedures

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25 Transcribed by: Devora Kessin

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18 BY: ROBERT J. KAPLAN, ESQ.

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1 P R O C E E D I N G S

2 THE COURT: Be seated please.

3 THE CLERK: SIPC v. BLMIS; trustee's motion for entry
4 of an order establishing notice procedures.

5 MR. HIRSCHFIELD: Good morning, Your Honor.

6 THE COURT: Good morning.

7 MR. HIRSCHFIELD: Mark Hirschfield from Baker
8 Hostetler on behalf of the trustee.

9 We have three matters on the calendar this morning;
10 the first as was mentioned, the motion to establish notice
11 procedures. My colleague, Jim Day will present that to the
12 Court.

13 MR. DAY: Good morning, Your Honor.

14 THE COURT: Good morning.

15 MR. DAY: I'm Jim Day from Baker and Hostetler on
16 behalf of the trustee in the consolidated liquidation of
17 Bernard L. Madoff Investment Securities.

18 As this Court is aware, on October 20th of this year,
19 the trustee filed a motion for entry of an order establishing
20 notice procedures to ensure that those parties in interest who
21 wish to receive notice of pleadings filed in these proceedings
22 receive such notice in an efficient and timely manner. Up
23 until this point, Bankruptcy Rule 2002 has required the trustee
24 to serve mailed notice of documents upon a service list that
25 has grown to number nearly 17,000 individuals and entities at

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1 an average cost of approximately 60,000 dollars per mailing.

2 Many of these recipients have specifically requested
3 to no longer receive such notices. In light of the
4 considerable time and expense involved with serving these
5 notices and given the negligible benefit and communicated
6 burden the notices have conferred upon those that have received
7 them, the trustee has taken examples from prior large
8 bankruptcy cases to formulate a series of notice procedures
9 that ensure all interested parties receive the notices that
10 pertain to them and that they wish to receive while eliminating
11 the inefficiencies involved with serving physical notice on all
12 parties with only a general interest in the Madoff litigation.

13 The motion therefore requests that the Court enter an
14 order establishing the notice procedures submitted in
15 conjunction with the motion. The trustee has received only two
16 responses to the notice procedures motion, but before
17 addressing those, and the applicable legal standards pertaining
18 to the motion, I would like to take a moment to give Your Honor
19 an overview of the proposed notice procedures themselves.

20 There are three over-arching concepts guiding the way
21 these notice procedures are structured. The first of those
22 concepts is that notice should be given by e-mail rather than
23 regular mail to those that are able to receive notice by e-
24 mail.

25 The second concept is that only those that self-select

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1 or opt-in should receive all notices required to be served in
2 the main case under Rule 2002.

3 And the third concept is to ensure that individuals
4 receive notices that do in fact directly apply to them and
5 their interest, irrespective of whether they have opted in or
6 not.

7 The notice procedures are thus divided into three
8 sections. The first section establishes procedures for service
9 of process in the main Madoff case. The second section
10 establishes notice procedures for those adversary proceedings
11 that were not covered by the litigation case management
12 procedures order that Your Honor entered in November of last
13 year. And the third section establishes general procedures to
14 be filed in both the main case and in the related adversary
15 proceedings.

16 In order to accomplish the goals I mentioned earlier,
17 the first section provides that notice of pleadings, exhibits,
18 objections, settlements, responses, and other papers will only
19 be served upon those parties that are either listed on a master
20 service list or that have interest that are directly affected
21 by a specific pleading. This rule clarifies that only those
22 that are parties to an agreement, settlement or compromise
23 require to be served pursuant to Bankruptcy Rule 9019, are
24 directly affected by that pleading.

25 Another provision is that pro se parties unable to

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1 receive service by e-mail may be added to the master service
2 list and receive service by regular mail or another means
3 reasonably calculated to affect service, such as facsimile or
4 overnight delivery by returning a form sent with notice of the
5 entry of the order establishing the notice procedures. These
6 pro se parties may also elect to receive notice by e-mail. So
7 far Your Honor, we've already sent out a series of these forms
8 with notice of this motion and we received dozens of these
9 forms back already. But the overwhelming majority of the forms
10 that we have received back from parties in interest in this
11 case have requested to be served by e-mail.

12 Parties that are represented by counsel are added to
13 the master service list by filing a notice of appearance in the
14 main case. For those parties whose interest are directly
15 affected by a specific pleading but have not designated an e-
16 mail address for service, the notice procedures provide that
17 those parties may be contacted by the party desiring to affect
18 service and ask to designate an e-mail address for service. If
19 such a designation cannot be obtained, service will be deemed
20 "complete" at the last known mailing address of facsimile
21 number of the party being served. However pro se parties may
22 receive service by regular mail, overnight mail or facsimile if
23 they do not designate an e-mail address for service.

24 The second section clarifies that in those adversary
25 proceedings not covered by last year's litigation case

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1 management procedures order, service shall be made by e-mail
2 and there shall be no obligation to serve paper copies of
3 pleadings other than the complaint and the summons.

4 The third section provides specific guidelines for how
5 to serve notice by e-mail; clarifying that service upon the
6 trustee is not required and that when electronic consent to a
7 party's signature is given, a hard copy of the originally
8 executed document need not be exchanged or kept. It was in
9 response to this third section Your Honor, that the trustee
10 received the only substantive objection that was filed in
11 response to the notice procedures motion. But before I turn to
12 that, I would first like to address the other response that was
13 filed to the motion.

14 That response was filed by the Bank of Kuwait and
15 requested a clarification that the notice procedures do not
16 apply to jurisdictional documents such as summonses and
17 complaints. It was never the trustee's intent that the notice
18 procedures apply to summonses and complaints or jurisdictional
19 documents. Thus the amended notice procedures that were filed
20 on Monday make the requested clarification by excluding
21 jurisdictional documents from the definition of pleadings. We
22 received authorization from the Bank of Kuwait on Monday to
23 state on the record that Bank of Kuwait's concerns have been
24 resolved by the amended notice procedures that we filed on
25 Monday.

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1 The substantive objection I mentioned earlier was
2 filed by MUUS Independence Fund and was directed at Section
3 (d) of the proposed notice procedures. As originally set
4 forth, this provision had the effect of adding three days to
5 the requisite time prior to the hearing date, before which
6 service had to be completed when service was affected by
7 regular mail, but no additional time for e-mail service. Given
8 the large number of international parties that may receive
9 notices in the Madoff litigation, and given that only pro se
10 parties are allowed to receive notice by regular mail under the
11 notice procedures, the trustee felt it appropriate that service
12 by regular mail should not be deemed "complete" until three
13 days after mailing so as to ensure that parties receiving
14 notice by regular mail were not placed at a disadvantage to
15 parties receiving notice by e-mail.

16 The MUUS objection argues that such a rule violates
17 Bankruptcy Rule 9006(f), which states that three days must be
18 added to the prescribed period whenever service is made by
19 either regular mail or e-mail. MUUS's position essentially, is
20 that in the context of computing time under rule 9006, there
21 cannot be any discrepancy between the time allotted to those
22 who receive service by e-mail and those that receive service by
23 regular mail.

24 Your Honor, as we set forth in our response to the
25 MUUS objection, the rule MUUS cites doesn't advance this

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1 argument. As a preliminary matter it must be emphasized that
2 Rule 9006 itself contemplates that Bankruptcy Courts have the
3 authority and discretion to prescribe methods of computing time
4 under the Bankruptcy Rules. Second, stating that e-mail
5 service is complete upon transmission merely reiterates what is
6 already written into the Rules themselves. The notice
7 procedures merely expand the time when service is deemed
8 "complete" upon mailing. This expansion of time is necessary
9 to put those pro se parties that receive notice by e-mail on --
10 that receive notice by mail -- on relatively equal footing with
11 those that receive notice by e-mail. As described in detail in
12 our response, the rule to which MUUS cites is based on a 2001
13 amendment to the Federal Rules of Civil Procedure that was
14 implemented to minimize any temporal disadvantage a litigant
15 might receive based on how they were served. That rule was
16 explicitly premised on encouraging litigants to consent to
17 service by e-mail; the operative word being "consent". In this
18 case, however, service by e-mail is being affected pursuant to
19 court order and not pursuant to the consent of the parties.
20 Therefore, the rule MUUS cites in its objection does not apply.

21 The three-day buffer period articulated in Rule
22 9006(f) is necessary for service by regular mail because there
23 can be significant variability between when a document is
24 mailed and when it is received. Some litigants might not
25 receive a document until three days after mailing while others

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1 might receive a mailing the next day. But in this day and age
2 Your Honor, service by e-mail is akin to service by hand
3 delivery. It is, for most of the litigants in this case -- and
4 especially those that elect to be on the master service list --
5 instantaneous.

6 In order to address any concerns Your Honor might have
7 regarding the MUUS objection, the amended notice procedures
8 provide that e-mail sent before 8 p.m. Prevailing Eastern Time
9 on a business day will be deemed to have affected service on
10 that day while an e-mail sent after 8 p.m. will be deemed to
11 have affected service on the following business day. We
12 believe this is a reasonable compromise solution that minimizes
13 the impact of the chance that an e-mail will not be read on the
14 day it is sent because of it being sent on a weekend, holiday
15 or after normal business hours.

16 Therefore Your Honor, the trustee respectfully
17 requests that Your Honor approve the notice procedures and
18 enter the proposed order as amended.

19 Thank you, Your Honor.

20 THE COURT: Anyone want to be heard?

21 MR. KAPLAN: Good morning Your Honor; Robert J. Kaplan
22 for MUUS Independence Fund and Michael Sonnenfeldt, defendants
23 in adversary proceeding 10-0445.

24 May it please the Court, I do not believe that the
25 solution that the trustee proffers for the problem in terms of

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1 trying to treat e-mail differently from regular mail solves the
2 problem. First of all, I have a fundamental difficulty with
3 the notion that once a determination has been made in the
4 Rules, that e-mail and regular mail should be treated the same,
5 that without some good cause shown, that that could be changed.
6 But presuming that it can be changed, the solution I think
7 simply creates new problems, which I'd like to bring to the
8 Court's attention.

9 The way the Rules are structured, e-mail that is sent
10 any time from 12:01 a.m. till 11:59 p.m. the following day is
11 deemed "served" on that day. So if you have a time limit and
12 you serve e-mail any time between those time periods, you have
13 fulfilled your obligation of serving the appropriate papers by
14 serving within that time. That solves --

15 THE COURT: They have a cure that's amended that.
16 Frankly I don't know what all the fuss is about and I don't
17 know why the trustee for example, is making such a big deal
18 about the three-day rule. I don't see where it is anything
19 other than putting everybody, perhaps, on the same level; I
20 don't see what all the fuss is about. I see some currency to
21 the objection and frankly, the slight fix when you deal with
22 the one-day service on a twenty-four or twelve hour period,
23 granting extra time.

24 My concern is that by treating recipients somewhat
25 differently, you're creating fodder for more litigation on

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1 timeliness of service and the like. And frankly, unless the
2 trustee can show me some further justification, I think there's
3 merit to the objection in treating all parties the same.

4 You won, you can sit down.

5 MR. KAPLAN: Thank you, Your Honor.

6 MR. DAY: Your Honor, we'll amend the order and
7 withdraw the provision and submit it to the Court later on
8 today.

9 THE COURT: Very well.

10 Frankly I don't see where the change that's been
11 suggested here has any great impact on the efficiencies and the
12 cost of service which you've already indicated. I'm taken with
13 60,000 dollars per mailing and I don't see that making this
14 amendment changes that.

15 So with respect to the basic motion, the proposed
16 procedural order is, in my judgment, reasonably calculated to
17 bring notice of matters effecting both parochial and general
18 interest home to the parties entitled to receive such notice
19 and to be able to protect their interest. So I will approve
20 the proposed order as to be modified by this record.

21 MR. DAY: Thank you, Your Honor.

22 MR. KAPLAN: Thank you, Your Honor.

23 (Whereupon these proceedings were concluded at 10:21 AM)

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2 **I N D E X**

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4 **RULINGS**

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6 Trustee's Motion for Entry of an Order	13	19
7 Establishing Notice Procedures Approved,		
8 Pending Modification		

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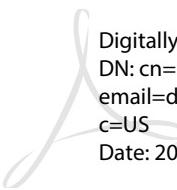
2 C E R T I F I C A T I O N

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4 I, Devora Kessin, certify that the foregoing transcript is a
5 true and accurate record of the proceedings.

6

7 Devora
8 Kessin



Digitally signed by Devora Kessin
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17 Date: December 1, 2011

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